

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL HENRY,  
Plaintiff,  
v.  
HOME DEPOT U.S.A., INC,  
Defendant.

Case No. 14-cv-04858-JST

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR CLASS  
CERTIFICATION**

Re: ECF No. 40

This is a putative class action against Defendant Home Depot U.S.A., Inc. for alleged violations of California's Labor and Business and Professions Codes. See ECF No. 1-2, Bertki Decl., Ex. A (Complaint). Now before the Court is Plaintiff Michael Henry's Motion for Class Certification. ECF No. 40. The Court concludes that Plaintiff has satisfied the requirements of Rule 23, and will grant the motion.

**I. BACKGROUND**

**A. Factual History**

This is a case about the designation of the workday.<sup>1</sup> Home Depot designates its workday to begin at 12:00 a.m. and end at 11:59 p.m. ECF No. 29-5, Barnaby Decl., Ex. A. This definition has been in place since at least September 2010 and applies to all non-exempt employees in

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<sup>1</sup> Under California law, a "workday" is defined as "any consecutive 24-hour period commencing at the same time each calendar day." Cal. Lab. Code § 500(a). When an employee works more than eight hours in one "workday," more than 40 hours in one "workweek," or for eight or fewer hours on the seventh day of the workweek, the employee is entitled to receive overtime compensation at one and one-half the employee's regular rate of pay. *Id.* § 510(a). Employers are afforded flexibility in their designation of a workday, but the designation must not be designed to evade paying overtime. See *Jakosalem v. Air Serv Corp.*, No. 13-CV-05944-SI, 2014 WL 7146672 at \*4 (N.D. Cal. Dec. 15, 2014); *Cummings v. Starbucks Corp.*, No. CV 12-06345-MWF FFMX, 2013 WL 2096435, at \*4 (C.D. Cal. May 14, 2013); *Seymore v. Metson Marine, Inc.*, 194 Cal. App. 4th 361, 370 (2011).

1 California. ECF No. 29-4, Barnaby Decl. ¶ 5.

2 Plaintiff Michael Henry worked as an hourly store employee of Home Depot between  
3 March 2004 and September 2013. ECF No. 1-2, Bertki Decl., Ex. A, Compl. ¶ 5. Henry alleges  
4 that Home Depot failed to pay him and other putative class members overtime even though he  
5 sometimes worked more than eight continuous hours in a shift. Id. ¶¶ 11, 59. This alleged failure  
6 to pay overtime occurred on shifts that crossed over midnight, thus spanning two calendar days.

7 Id.

8 **B. Procedural History**

9 Henry originally filed his Complaint on September 18, 2014 in the Superior Court of  
10 California, County of Alameda. See ECF No. 1-2, Bertki Decl., Ex. A, Compl. He alleges causes  
11 of action under California state law for: (1) failure to provide meal periods, (2) failure to provide  
12 rest periods, (3) failure to pay hourly and overtime wages, (4) failure to provide accurate written  
13 wage statements, (5) failure to pay all wages due at termination, (6) unfair competition, and (7)  
14 civil penalties under the Private Attorneys General Act. Id. ¶¶ 19–104.

15 On October 31, 2014, Home Depot removed the action to federal court pursuant to the  
16 Class Action Fairness Act. ECF No. 1.

17 On September 10, 2015, Home Depot filed a motion for partial summary judgment on the  
18 single issue of whether its definition of workday violated the California Labor Code. ECF No. 29.  
19 On December 10, 2015, the same day the Court heard arguments regarding the motion for partial  
20 summary judgment, Henry filed a motion for class certification. ECF No. 40. By agreement of  
21 the parties, the Court deferred ruling on that motion until after it could resolve Home Depot’s  
22 partial summary judgment motion. ECF No. 43.

23 On January 4, 2016, the Court issued an order denying Home Depot’s partial summary  
24 judgment motion. The Court determined that there remained a triable issue of material fact  
25 regarding whether Home Depot’s workday definition was designed to evade overtime laws. ECF  
26 No. 44 at 8.<sup>2</sup>

27

28 <sup>2</sup> Citations are to the pages assigned by the Court’s electronic case filing system and not to the  
internal pagination of the document.

1 On January 5, 2016, Henry re-noticed the instant motion for class certification. ECF No.  
2 45. Henry seeks to certify the following class:

3 All persons employed by Defendant[ ] in hourly or non-exempt  
4 positions in California from September 18, 2010 through the date of  
5 class certification, who worked a shift past midnight in which the  
6 total aggregate number of hours for that shift exceeded eight hours.

7 Id. at 6.<sup>3</sup> On February 3, 2016, Home Depot filed the opposition to the motion. ECF No. 46. On  
8 February 16, 2016, Henry filed the reply in support of the motion.<sup>4</sup> ECF No. 48. The Court heard  
9 oral argument on February 25, 2016.

## 10 **II. JURISDICTION**

11 Home Depot asserts, and Henry does not dispute, that Henry is of diverse citizenship from  
12 Home Depot, there are more than 100 class members nationwide, and the aggregate amount in  
13 controversy exceeds \$5,000,000. Therefore, the Court has jurisdiction over this action pursuant to  
14 the Class Action Fairness Act, 28 U.S.C. § 1332(d).

## 15 **III. LEGAL STANDARD**

16 Class certification under Rule 23 is a two-step process. First, a plaintiff must demonstrate  
17 that the numerosity, commonality, typicality, and adequacy requirements of 23(a) are met.

18 One or more members of a class may sue or be sued as  
19 representative parties on behalf of all members only if (1) the class  
20 is so numerous that joinder of all members is impracticable; (2)  
21 there are questions of law or fact common to the class; (3) the claims  
22 or defenses of the representative parties are typical of the claims or  
23 defenses of the class; and (4) the representative parties will fairly  
24 and adequately protect the interests of the class.

25 Fed. R. Civ. P. 23(a). “Class certification is proper only if the trial court has concluded, after a

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26 <sup>3</sup> Henry argues that his claims for unfair business practices and penalties are derivative of his  
27 overtime claim. ECF No. 45 at 21 n.3. Both parties agree that the derivative claims can only  
28 proceed on a class-wide basis if Henry’s overtime claim is certified. See id.; ECF No. 46 at 8 n.1.

<sup>4</sup> Along with the reply brief, Henry also filed his objections to the declaration of Arlyne Napoli  
and all of the new evidence and arguments introduced in Home Depot’s opposition. See ECF No.  
49. Henry’s reply brief is 14 pages, see ECF No. 48, and his memorandum of objections is 12  
pages, see ECF No. 49. Civil Local Rule 7-3(c) requires “[a]ny evidentiary and procedural  
objections to the opposition must be contained within the reply brief or memorandum” and that the  
reply brief not exceed 15 pages of text. The Court declines to consider the arguments raised in the  
separate memorandum of objections at ECF No. 49 but will consider Henry’s objections as raised  
in the reply brief.

1 ‘rigorous analysis,’ that Rule 23(a) has been satisfied.” Wang v. Chinese Daily News, Inc., 709  
2 F.3d 829, 833 (9th Cir. 2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 546 U.S. 338, 351 (2011)).

3 Second, a plaintiff must also establish that one of the bases for certification in Rule 23(b) is  
4 met. Here, Henry invokes Rule 23(b)(3), which requires the court to find “that the questions of  
5 law or fact common to class members predominate over any questions affecting only individual  
6 members, and that a class action is superior to other available methods for fairly and efficiently  
7 adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Additionally, “[w]hile it is not an  
8 enumerated requirement of Rule 23, courts have recognized that “in order to maintain a class  
9 action, the class sought to be represented must be adequately defined and clearly ascertainable.”  
10 Vietnam Veterans of Am. v. C.I.A., 288 F.R.D. 192, 211 (N.D. Cal. 2012) (quoting  
11 DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970)).

12 The party seeking class certification bears the burden of demonstrating by a preponderance  
13 of the evidence that all four requirements of Rule 23(a) and at least one of the three requirements  
14 under Rule 23(b) are met. See Dukes, 564 U.S. at 350–51.

#### 15 **IV. DISCUSSION**

16 Home Depot opposes the motion for class certification on a variety of grounds. First, it  
17 argues that Henry’s claim is based on a legally defective theory. Second, it argues that Henry  
18 cannot satisfy the commonality, predominance, typicality, or superiority requirements of Rule 23.  
19 The Court considers these arguments in turn.<sup>5</sup>

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21 <sup>5</sup> Henry argues that Home Depot has already conceded that class certification is proper based on  
22 Home Depot’s conduct in discovery. ECF No. 45 at 13. Henry contends that Home Depot’s  
23 “boilerplate responses regarding why a class should not be certified” precludes Home Depot from  
24 offering facts or evidence in opposition to its class certification motion that were not set forth in its  
25 discovery responses. Id. at 14. Home Depot responds that its responses fully placed Henry on  
notice of its defenses to class certification. ECF No. 46 at 19. Home Depot argues that the cases  
cited by Henry to support his argument are inapposite because the cases involved patent  
infringement and “more rigorous patent disclosure standards.” Id.

26 The Court will not decline to entertain Home Depot’s arguments in opposition to class  
27 certification. When asked in an interrogatory to “state all reasons why this case should not be  
28 certified as a class action,” ECF No. 40-5, Setareh Decl., Ex. 4, Home Depot sufficiently placed  
Henry on notice of its defenses to certification. Home Depot asserted that it was necessary to  
conduct individualized inquiries to determine whether overtime violations occurred and that Henry  
might not be an appropriate class representative. See ECF No. 40-3, Setareh Decl., Ex. 2 at 8.

1           **A.       Whether Henry Asserts a Legally Defective Theory**

2           Home Depot argues that the proposed class is not certifiable because Henry relies on a  
3           legally defective theory.

4           In Henry’s opposition to Home Depot’s motion for partial summary judgment, he argued  
5           that Home Depot was required to adopt a shift-based workday definition that began each workday  
6           at the beginning of a worker’s shift. In support of this argument, he relied heavily on the statutory  
7           interpretation of California Labor Code section 510 in In re Wal-Mart Stores, Inc. Wage & Hour  
8           Litig., 505 F. Supp. 2d 609 (N.D. Cal. 2007) (interpreting section 510(a) to include a shift-based  
9           overtime requirement). Agreeing with the court in Jakosalem v. Air Serv Corp., No. 13-CV-  
10          05944-SI, 2014 WL 7146672 (N.D. Cal. Dec. 15, 2014), however, this Court rejected Henry’s  
11          argument that employers are required in all instances to define each employee’s workday to begin  
12          with that employee’s shift. ECF No. 44 at 5–6.

13          Although the Court rejected Henry’s statutory interpretation of Labor Code section 510,  
14          the Court also concluded that Home Depot failed to establish as a matter of law that its workday  
15          designation was not designed to evade paying overtime. Id. at 8. Home Depot previously  
16          conceded that it may not establish a definition of workday where the designation’s primary  
17          purpose is to reduce the overtime pay of its employees. See ECF No. 29 at 10. That Home Depot  
18          could be liable for paying overtime if it designated a workday primarily to evade overtime  
19          compensation is a legally viable theory supported by existing law. See, e.g., Jakosalem, 2014 WL  
20          7146672, at \*4; Seymore v. Metson Marine, Inc., 194 Cal. App. 4th 361, 370 (2011).

21           **B.       Whether Rule 23’s Requirements Are Met**

22          The parties next dispute whether Henry meets the requirements of Rule 23.

23           **1.       Numerosity**

24          Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is  
25          impracticable.” Fed. R. Civ. P. 23(a)(1). “[C]ourts generally find that the numerosity factor is  
26          satisfied if the class comprises 40 or more members.” In re Facebook, Inc., PPC Advertising  
27          Litig., 282 F.R.D. 446, 452 (N.D. Cal. 2012).

28          Henry argues that the proposed class is sufficiently numerous because Home Depot has

1 admitted that there are more than 20,000 employees in the proposed class of employees who have  
 2 worked shifts longer than eight hours that crossed over midnight. See ECF No. 45 at 14. To  
 3 support its Notice of Removal, Home Depot submitted evidence that over “20,000 Home Depot’s  
 4 hourly employees in California have worked at least one such shift” between September 18, 2010  
 5 and September 14, 2014. ECF No. 1 ¶ 6; ECF No. 1-5, Anderson Decl. ¶ 7. Home Depot does  
 6 not dispute Henry’s contentions regarding numerosity.

7 The Court concludes that Henry has satisfied the numerosity requirement.

8 **2. Commonality and Predominance**

9 A Rule 23 class is certifiable only if “there are questions of law or fact common to the  
 10 class.” Fed. R. Civ. P. 23(a)(2). “[F]or purposes of Rule 23(a)(2) [e]ven a single [common]  
 11 question will do.” Dukes, 564 U.S. at 359 (internal quotation marks omitted). However, the  
 12 common contention “must be of such a nature that it is capable of classwide resolution—which  
 13 means that determination of its truth or falsity will resolve an issue that is central to the validity of  
 14 each one of the claims in one stroke.” Id. at 350. “What matters to class certification . . . is not  
 15 the raising of common ‘questions’—even in droves—but rather the capacity of a classwide  
 16 proceeding to generate common answers apt to drive the resolution of the litigation.” Id. (quoting  
 17 Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. REV. 97,  
 18 131–32 (2009)). The party seeking certification “need only show that there is a common  
 19 contention capable of classwide resolution—not that there is a common contention that will be  
 20 answered, on the merits, in favor of the class.” Alcantar v. Hobart Serv., 800 F.3d 1047, 1053 (9th  
 21 Cir. 2015) (internal quotation omitted).

22 A plaintiff seeking certification pursuant to Rule 23(b)(3) must show not only  
 23 commonality, but also predominance. See Hanlon v. Chrysler Corp., 150 F.3d 1101, 1022 (9th  
 24 Cir. 1998). Thus, in seeking to certifying a Rule 23(b)(3) class, the plaintiff must show that the  
 25 common questions in the case “predominate over any questions affecting only individual  
 26 members.” Fed. R. Civ. P. 23(b)(3). “When common questions present a significant aspect of the  
 27 case and they can be resolved for all members of the class in a single adjudication, there is clear  
 28 justification for handling the dispute on a representative rather than an individual basis.” Hanlon,

1 150 F.3d at 1022 (citing Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice &  
2 Procedure § 1778 (2d ed.1986)). “[T]he predominance requirement of Rule 23(b)(3) is generally  
3 satisfied if a party can show that an employer used a standard policy that was uniformly  
4 implemented.” Amey v. Cinemark USA Inc., No. 13-CV-05669-WHO, 2015 WL 2251504, at \*6  
5 (N.D. Cal. May 13, 2015).

6 Henry argues that this case concerns a “standard policy that was uniformly implemented,”  
7 because Home Depot’s workday definition is uniform for all class members. See ECF No. 45 at  
8 16. Home Depot’s designated workday begins at 12:00 a.m. and ends at 11:59 p.m., and pursuant  
9 to its overtime policies, “hourly employees in California are provided with overtime pay for  
10 anytime worked in excess of eight hours in a workday.” Id. Henry argues that the predominance  
11 requirement is met because Home Depot’s liability turns on the lawfulness of the uniform policy.  
12 ECF No. 45 at 19.

13 Home Depot agrees “the critical liability inquiry is whether Home Depot’s workday was  
14 designed to ‘evade overtime compensation.’” ECF No. 46 at 20 (quoting Seymore, 194 Cal. App.  
15 4th at 370–71). Notwithstanding, Home Depot contends that this claim requires individualized  
16 analysis for each potential class member to determine whether Home Depot’s workday  
17 designation was designed to evade overtime as to each employee. Id. at 23.

18 Home Depot first argues that individual fact questions would predominate at trial, although  
19 Henry challenges a common policy. ECF No. 46 at 13. Home Depot cites to In re Wells Fargo  
20 Home Mortgage Overtime Pay Litig., 571 F.3d 953 (9th Cir. 2009), and Gales v. Winco Foods,  
21 No. 09-05813 CRB, 2011 WL 3794887 (N.D. Cal. Aug. 26, 2011), to support its argument that  
22 individualized issues can make class treatment improper even when an employment policy is  
23 applied uniformly.

24 In Wells Fargo, the Ninth Circuit examined an employer’s internal policy that treated  
25 employees as exempt from overtime laws. 371 F.3d at 953. Whether individual employees  
26 qualified for the exemptions raised a number of issues related to variations in job experiences and  
27 duties. Id. at 956. Ultimately, the Ninth Circuit held that although Wells Fargo had a uniform  
28 exemption policy, “the blanket exemption policy does nothing to facilitate common proof on the

1 otherwise individualized issues.” Id. at 959.

2 In Winco Foods, the district court looked at whether Winco misclassified its assistant store  
3 managers under the executive exemption. 2011 WL 3794887, at \*1. The court found that  
4 individual questions predominated because there was significant evidence of variation in the  
5 assistant manager jobs. The court further found that although there was a uniform classification  
6 policy, plaintiffs’ evidence did not “answer the central question in this case: whether [assistant  
7 managers] spen[t] the majority of their time performing exempt duties.” Id. at \*6.

8 This case is unlike Wells Fargo and Winco Foods. Exemption classifications, “which may  
9 sometimes be fact-intensive,” are not at issue here. See Abdullah v. U.S. Sec. Associates, Inc.,  
10 731 F.3d 952, 965 (9th Cir. 2013). The instant case does not require such individualized inquiries  
11 into the circumstances and schedules of non-exempt employees. Putative class members can  
12 establish Home Depot’s liability for overtime if Home Depot did not have a “legitimate business  
13 purpose” in how it designated the workday for its non-exempt workers as a group.<sup>6</sup> Either the trier  
14 of fact finder will find that Home Depot set its uniform workday definition to evade paying  
15 overtime, or it will not so find. Seymore, 194 Cal. App. 4th at 371. If putative class members  
16 prove Home Depot’s liability, damages will then be “calculated based on the wages each  
17 employee lost due to [Home Depot]’s unlawful practices.” Leyva v. Medline Indus. Inc., 716 F.3d  
18 510, 514 (9th Cir. 2013).

19 Home Depot next argues that Henry offers no common evidence that would permit class-  
20 wide resolution of the workday designation. ECF No. 46 at 15. Home Depot contends that  
21 resolution requires inquiries into “work hours and schedules of potential class members, focusing  
22 primarily on the frequency of overnight shifts, the reasons they worked overnight shifts, and the  
23 reasons such shifts exceeded eight hours.” Id. This argument mischaracterizes the litigation. The  
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25 <sup>6</sup> For example, the Jakosalem court discussed whether the trier of fact could make “any  
26 statistically significant conclusions” about the effect of the employer’s day divide on overtime  
27 pay. See Jakosalem, 2014 WL 7146672, at \*5. As Henry points out, Home Depot cites to  
28 statistical evidence to support their contention that the workday policy was not designed to evade  
overtime. See, e.g., ECF No. 46 at 7 (stating that 13,000 employees worked only one or two  
overnight shifts of more than eight hours and another 10,000 employees worked between three and  
ten such shifts).



1 relevant inquiry at trial will not be how Home Depot applied its workday policy to each individual  
2 class member, but whether it had an adequate justification for the policy in the first place.  
3 Whether Home Depot is liable for overtime pay will turn on whether Home Depot had a legitimate  
4 business purpose for its workday designation and not why any particular class member worked a  
5 shift that crossed the midnight divide.<sup>7</sup>

6 Home Depot also contends that the absence of records regarding the reasons why  
7 individual class members worked specific overnight shifts highlights the lack of common evidence  
8 regarding Plaintiff's claims. ECF No. 46 at 17. Again, this misapprehends the nature of the  
9 litigation. Home Depot has demonstrated that it has kept the records of its employees in a time-  
10 keeping database and knows which employees worked shifts longer than eight hours that crossed  
11 the midnight divide. Home Depot's notice of removal and motion for partial summary judgment  
12 included evidence of the number of non-exempt employees that worked at least one shift longer  
13 than eight hours that crossed midnight and the total number of shifts in excess of eight hours. See  
14 ECF No. 1 ¶ 6; ECF No. 33-1, Anderson Supplemental Decl. ¶ 4. That kind of class-wide  
15 evidence is what will be needed to resolve this case.

16 Finally, Home Depot argues that liability issues that require examination of the reasons for  
17 employment decisions are unsuitable for class treatment. ECF No. 46 at 18 (citing to Dukes v.  
18 Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115, 1126–27 (N.D. Cal. 2013) and other cases).  
19 However, this case is unlike Dukes v. Wal-Mart and the other cases cited by Home Depot, where  
20 discrimination liability turned on individual managers' decisions. Instead, this case is like Leyva

21 \_\_\_\_\_  
22 <sup>7</sup> In its opposition to class certification, Home Depot provides reasons explaining why putative  
23 class members were scheduled to work overnight and the various reasons some overnight shifts  
24 exceeded the scheduled eight hours. See ECF No. 46 at 17. In support of this explanation, Home  
25 Depot submitted the declaration of Arlyne Napoli, the District Human Resources Manager in  
26 California. ECF No. 46-4. Henry contends that Napoli's declaration should be excluded because  
27 she did not appear in Home Depot's initial Rule 26(a) disclosures and was not identified in Home  
28 Depot's discovery responses, and the facts offered by Napoli were not offered in support of Home  
29 Depot's motion for summary judgment. ECF No. 48 at 8–9. These are good grounds for  
30 exclusion of Napoli's declaration. See Fed. R. Civ. P. 37; Hoffman v. Constr. Protective Servs.,  
31 Inc., 541 F.3d 1175, 1179 (9th Cir. 2008), as amended (Sept. 16, 2008) ("Under Rule 37,  
32 exclusion of evidence not disclosed is appropriate unless the failure to disclose was substantially  
33 justified or harmless."). For the reasons set forth in the body of this order, however, the reasons  
34 given by Napoli are not relevant to the Court's class certification decision. The Court therefore  
35 declines to reach Plaintiff's objection to her declaration.

1 v. Medline Industries, Inc., 716 F.3d 510 (9th Cir. 2013), in that the appropriate inquiry examines  
2 whether the uniform policy is lawful. In Leyva, Medline rounded its hourly employees' start  
3 times in 29-minute increments. Id. at 512. Plaintiffs alleged that this practice resulted in  
4 employees performing unpaid work. Id. The Ninth Circuit concluded that the common questions  
5 predominated over individual questions because the inquiry turned on whether Medline was liable  
6 for this rounding practice. Id. at 514. Damages would then "be calculated based on the wages  
7 each employee lost due to Medline's unlawful practices." Id. Despite Home Depot's contentions  
8 otherwise, determining whether Home Depot is liable for its uniform workday designation can be  
9 assessed "in one stroke." Dukes, 564 U.S. at 350.

10 Henry has identified common questions of law and fact concerning overtime wages and  
11 whether Home Depot's uniform workday designation violates California law. These questions can  
12 be answered on a class-wide basis. The Court concludes that Henry has satisfied the commonality  
13 and predominance requirements.

### 14 3. Typicality

15 In certifying a class, courts must find that "the claims or defenses of the representative  
16 parties are typical of the claims or defenses of the class." Fed R. Civ. P. 23(a)(3). "The purpose  
17 of the typicality requirement is to assure that the interest of the named representative aligns with  
18 the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).  
19 "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably  
20 coextensive with those of absent class members; they need not be substantially identical." Parsons  
21 v. Ryan, 754 F.3d 657, 685 (9th Cir. 2014) (quoting Hanlon, 150 F.3d at 1020). "The test of  
22 typicality 'is whether other members have the same or similar injury, whether the action is based  
23 on conduct which is not unique to the Named Plaintiffs, and whether other class members have  
24 been injured by the same course of conduct.'" Id. (quoting Hanon, 976 F.2d at 508).

25 Henry asserts that he has suffered the same injury as the class: "not being paid overtime  
26 where he worked an overnight shift of more than eight hours, based on Home Depot's policy of  
27 not paying overtime for hours worked after midnight." ECF No. 40 at 17. Home Depot disagrees,  
28 arguing that the typicality requirement is not established in this case. First, Home Depot argues

1 that Henry cannot represent the class because he did not suffer an injury. ECF No. 46 at 22. In  
2 only one percent of Henry’s shifts did Henry work an overnight shift greater than eight hours and  
3 Henry has not suggested that “as to him, the workday was designed to evade overtime.” Id.  
4 Second, Home Depot contends that Henry fails to show that the frequency and reasons for his  
5 overnight shifts is typical of the class. Id. at 23.

6 These asserted differences are irrelevant. Henry’s alleged harm stems from Home Depot’s  
7 allegedly improper policy of designating the workday from 12:00 a.m. to 11:59 p.m. Henry has  
8 clearly alleged injury as the rest of the proposed class, since he has worked several overnight shifts  
9 greater than eight hours. ECF No. 45 at 9. Henry’s claims are identical to the putative class  
10 members. The Court concludes that Henry has demonstrated typicality.

11 **4. Adequacy**

12 “The adequacy of representation requirement . . . requires that two questions be addressed:  
13 (a) do the Named Plaintiffs and their counsel have any conflicts of interest with other class  
14 members and (b) will the Named Plaintiffs and their counsel prosecute the action vigorously on  
15 behalf of the class?” In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 462 (9th Cir. 2000). The  
16 requirement “‘tend[s] to merge’ with the commonality and typicality criteria of Rule 23(a).”  
17 Amchem Prods. v. Windsor, 521 U.S. 591, 626 n.20 (1997) (quoting Gen. Tel. Co. of Sw. v.  
18 Falcon, 457 U.S. 147, 158 n.13 (1982)). Among other functions, the requirement serves as a way  
19 to determine whether “the Named Plaintiff’s claim and the class claims are so interrelated that the  
20 interests of the class members will be fairly and adequately protected in their absence.” Falcon,  
21 457 U.S. at 158 n.13.

22 The Court finds that Henry has satisfied both prongs of Rule 23(a)(4)’s adequacy  
23 requirement. First, there is no apparent conflict of interest between Henry and other class  
24 members. Second, Henry has retained counsel with experience in wage-and-hour class action  
25 litigation. ECF No. 45 at 18. Nothing in the record suggests, and Home Depot does not argue,  
26 that Henry and his counsel fail to meet Rule 23(a)(4). Henry has satisfied the adequacy  
27 requirement.

28 Additionally, the Court finds Setareh Law Group is adequate under Rule 23(g)(1) and (4)

1 and will appoint Setareh Law Group as class counsel.

2 **5. Superiority**

3 A class action must be “superior to other available methods for fairly and efficiently  
4 adjudicating the controversy.” Fed. R. Civ. Pro. 23(b)(3). “The superiority inquiry under Rule  
5 23(b)(3) requires determination of whether the objectives of the particular class action procedure  
6 will be achieved in the particular case.” Hanlon, 150 F.3d at 1023. “[C]ertification pursuant to  
7 Rule 23(b)(3) . . . is appropriate ‘whenever the actual interests of the parties can be served best by  
8 settling their differences in a single action.’” Id. at 1022 (quoting 7A Wright & Miller, Federal  
9 Practice & Procedure § 1777 (2d ed. 1986)). The four factors for the Court's examination are: (1)  
10 the interest of each class member in individually controlling the prosecution or defense of separate  
11 actions; (2) the extent and nature of any litigation concerning the controversy already commenced  
12 by or against the class; (3) the desirability of concentrating the litigation of the claims in the  
13 particular forum; and (4) the difficulties likely to be encountered in the management of a class  
14 action. Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190–92 (9th Cir.) opinion  
15 amended on denial of reh’g, 273 F.3d 1266 (9th Cir. 2001).

16 Here, class members do not have any significant interest in pursuing individual litigation.  
17 As Henry points out, the amount of overtime pay a putative class member would be entitled to  
18 receive “would quickly be dwarfed by the cost of litigation.” ECF No. 45 at 23 n.4. While there  
19 is another wage and hour suit against Home Depot, see Bell v. Home Depot, Inc., 2:12-cv-02499-  
20 GEB-CKD, the actions involve different putative classes and different time periods for the  
21 overnight overtime claim. In Bell, the proposed class is defined as all hourly supervisors in  
22 California retail stores. ECF No. 37. The present action is defined as all hourly non-exempt  
23 employees. Additionally, plaintiffs in Bell allege several other claims that are not alleged in the  
24 present action. Based on these differences in the pending action, the Court concludes that class  
25 certification remains superior in this action.

26 Home Depot asserts that a class trial would be unmanageable because the trial would  
27 require examination of “thousands of circumstances unique to individual workers and particular  
28 shifts.” ECF No. 46 at 23. The Court, however, foresees no likely difficulties in managing this

1 case as a class action because the overtime claim requires looking at the purpose of Home Depot’s  
2 uniform workday designation.

3 The Court concludes Henry established that class adjudication would be superior.

4 **6. Ascertainability**

5 Ascertainability “is an inherent requirement of at least Rule 23(b)(3) class actions.” Lilly  
6 v. Jamba Juice Co., 308 F.R.D. 231, 236 (N.D. Cal. 2014) (citing William B. Rubenstein,  
7 Newberg on Class Actions §§ 3:1–3:3 (5th ed.)). “[A] class definition is sufficient if the  
8 description of the class is ‘definite enough so that it is administratively feasible for the court to  
9 ascertain whether an individual is a member.’” Vietnam Veterans of Am., 288 F.R.D. at 211  
10 (quoting O’Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998)).

11 Henry persuasively argues that the proposed class is ascertainable. First, the proposed  
12 class is defined by objective criteria: individuals (1) employed by Home Depot in hourly or non-  
13 exempt positions from September 18, 2010 through the date of certification, and (2) worked a shift  
14 past midnight that exceeded eight hours. Henry also points out that Home Depot has already  
15 identified the members of the class he seeks to certify. See ECF No. 1 ¶ 6 (identifying more than  
16 20,000 class members).

17 The Court finds that the proposed class is ascertainable.

18 **CONCLUSION**

19 The Court grants Henry’s motion for class certification. The Court certifies the class  
20 consisting of all persons employed by Home Depot in hourly or non-exempt positions in  
21 California from September 18, 2010 through the date of class certification, who worked a shift  
22 past midnight in which the total aggregate number of hours for that shift exceeded eight hours.  
23 The Court also appoints Setareh Law Group as class counsel pursuant to Rule 23(g).

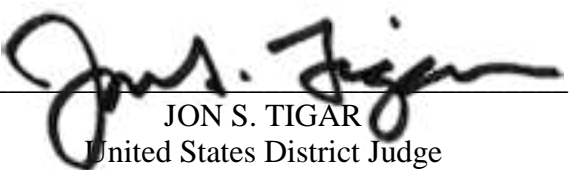
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In the joint case management statement due on May 25, 2016, the parties are ordered to propose a schedule for the remainder of the case through trial. The Court will conduct a Case Management Conference on June 8, 2016 at 2:00 p.m.

IT IS SO ORDERED.

Dated: May 3, 2016

  
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JON S. TIGAR  
United States District Judge